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Supreme Court, U.S.
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In The

Supreme Court of The United States

October Term, 1995

ALLDERS INTERNATIONAL (SHIPS) LTD.,
and EAGLE STAR REINSURANCE CO., LTD.,

Petitioners,

- against -

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the *Robins Dry Dock* doctrine is so rigid as to preclude recovery for economic loss by the owner of shops which form part of a cruise ship which grounded due to the negligence of a third-party, when the owner of the ship itself can recover, and indeed, whether modern day concepts of proximate cause and remoteness should not supplant that doctrine so as to avoid such an anomalous result?

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

ALLDERS INTERNATIONAL (SHIPS) LTD. and EAGLE STAR REINSURANCE CO., LTD., *Petitioners*,

against

UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Allders International (Ships) Ltd. ("Allders") and Eagle Star Reinsurance Co., Ltd. ("Eagle Star"),[1] respectfully petition for a writ of certiorari to review

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[1] The parents, subsidiaries and affiliates of Eagle Reinsurance Star Ltd. are Eagle Star Insurance Co. Ltd., Threadneedle Insurance Co. Ltd., Western Star Insurance Co. Ltd., Eagle Star Holding PLC and BAT Industries. The parents, subsidiaries and affiliates of Allders International (Ships) Ltd. are Allders Department Stores Ltd., Shotvent Ltd., Allders International Ltd., Ocean Trading Ltd., Allders International (UK) Ltd., Allders International (Japan) KK, Allders International (Oceania) Pty Ltd., Allders International Pty Ltd., Allders International (USA) Inc., Allders International (Canada) Ltd, Net Magaza Isletmeciligi Ve Ticaret AS and Allders Nouvelle Caledonie SA, Allders International Inc., Allders International (Carribean) Ltd., and Allders plc.

the Judgment of the Second Circuit Court of Appeals in this case which affirmed the district court's demissal of plaintiff's complaint under Fed. R. Civ. P. 12 (b) (6).

OPINIONS BELOW

The order and opinion of the Court of Appeals (Appendix or App., *infra*, A-1 to A-3) is unreported. The opinion of the district court on the motion for reconsideration and reargument (App., A-16) is unreported. The original opinion of the district court (App., A-4 to A-15) is not officially reported, but is unofficially reported in *Westlaw* at WS 251571and *The American Maritime Cases* at 1995 AMC 1660 (S.D.N.Y. April 26, 1995).

The Court of Appeals entered its judgment on January 16, 1996 (App., *infra*, A-3). The jurisdiction of this Court is accordingly involved under 28 U.S.C. § 2101 (c).

The Court's subject matter jurisdiction is based on the Suits In Admiralty Act, 46 U.S.C. Sections 741 *et seq.*, on the Public Vessels Act, 46 U.S.C. Sections 781-790, and on 28 U.S.C. Section 1333 (1). The United States is the sole defendant herein.

STATEMENT

> *Robins Dry Dock* . . represents the dying hand of the past attempting and failing to grasp the realities of the present.
>
> --Hon J. M. Wisdom
> Senior Judge,
> Fifth Circuit Court of Appeals

A. Importance of the Case

(i) The Mystifying Three-Page *Robins Dry Dock* Decision

Throughout the long history of the maritime law, no decision has been more critiqued for its mystifying and artificial approach to justice -- at the bar, in the law reviews, in the Courts, and at the helm-- than this Courts' 1927 decision in *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303, 48 S. Ct. 134 (1927). That decision, though running only three pages and while not cause for much comment by this Court -- it was only cited once by this Court between 1927 and 1986[2] -- has caused wide splits between the Circuits. As described in more detail below, the Fourth and Sixth Circuits have effectively ignored the doctrine, the Second Circuit initially did the same but then reluctantly enforced it, and the Fifth Circuit has, on its own, carved out wide exceptions to it. The Fifth Circuit and Eleventh Circuit Court have heard cases *en banc* so as to resolve splits within themselves, and Third Circuit judges are also split.[3] *See generally* Jerome C. Scowcroft, "*Economic Loss in Admiralty: A Re-examination of Foundations,*" 16 *J. Mar. L. & Comm.* 267, at 270 n. 17 and 271-272 (1985).

Law reviews have repeatedly revisited the doctrine, with the scholarly consensus failing to fully accept it, and considered it ripe for reconsideration. *See e.g.*, Hon. J. M. Wisdom (Senior Judge, 5th Cir.), *Admiralty Jurisdiction and*

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[2] The case being *Aktieselskabet Cuzco v. The Sucarseco* ("The Toluma"), 294 U.S. 394, 55 S.Ct. 467 (1935), discussed at length under Point II *infra.* The 1986 case was *East River Steamship Corp., v. Transamerica Delaval, Inc.*, 776 U.S. 858, 106 S.Ct. 2295, at n. 6 (1986).

[3] *State of Louisiana ex rel. Guste v Testbank,* 752 F.2d 1019, 1985 AMC 1521 (5th Cir. 1985) (en banc, 10 - 5 decision), *cert denied,* 106 S. Ct. 3271 (1986); *Hercules Carriers, Inc. v. State of Florida,* 720 F. 2d 1201, 1984 AMC 2962 (11th Cir. 1983), *aff'd,* 728 F.2d 1359, 1985 AMC 2396 (11th Cir.1983) (en banc, 6-6 decision), *cert. denied,* 469 U.S. 835 (1984); *Getty Refining and Marketing Company v. M/T Fadi B,* 766 F.2d 829, 1985 AMC 2579 (3d Cir. 1985) (2-1 decision);

Products Liability: Economic Loss, 62 *Tulane L. Rev.* 325 (1988), in which the distinguished jurist-author strongly concluded that ". . . *Robins Dry Dock*, *TESTBANK*, and *East River* represent the dying hand of the past attempting and failing to grasp the realities of the present." (*id.*, at 336). Another leading scholar of maritime law and marine insurance has argued that *Robins Dry Dock's* "blanket rule against recovery for economic loss" with its "fluid and uncertain exceptions" leads to "arbitrary and inconsistent" decision making by courts. W. Tetley, Q. C., *Damages and Economic Loss in Marine Collision: Controlling the Floodgates*, 22 *J. Mar. L. & Comm* 539 (1991). Prof Tetley further concludes: "The civil law approach, in its focus on causation, is to be preferred to the common law approach emphasizing the type of damages sustained. It is proposed by the writer that the civil solution for economic loss be adopted by the maritime law." (*id.*, at 584).

Perhaps the most comprehensive case-by-case analysis of all is Owen, *Recovery for Economic Loss under U.S. Maritime Law: Sixty Years under Robins Dry Dock, 18 J. Mar. L. & Comm.* 157, 160 n. 15 (1987) (noting that between 1927 and 1986 thirty appellate decisions were issued concerning the *Robins Dry Dock* doctrine, *certiorari* sought ten times, and in each case it was denied).

Additional examples of modern law review commentary which is in varying degrees critical of this doctrine include Comment, *The Murky Waters of Robins Dry Dock: A Comparitive Analysis of Economic Loss in Maritime Law," 60 Tulane L. Rev.* 995 (1986); Goldberg, *Recovery for Pure Economic Loss in Tort: Another Look at Robins Dry Dock v. Flint, 20 J. Legal Studies* 249 (1991); Gabriel, *TESTBANK: The Fifth Circuit Reaffirms the Bright Line Rule of Robins Dry Dock and Fails to devise a Test to allow Recovery for Pure Economic Damages, 31 Loy. L. Rev.* 265 (1985); Underhill, *The Sovereign as Plaintiff: Clean Seas and other Coin of the Realm, 3 U.S.F. Mar. L. J.* 37, 59-62 (1991);

Heiser, Note, *Recovery of Economic Losses: Robins Dry Dock Remains a Dominant Force - Louisiana ex rel. Guste v. M/V TESTBANK, 10 Mar. Law.* 283 (1985); Harper, *Interference with Contractual Relations*, 47 Nw.U.L.Rev. 873, 885-89 (1953); James, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 Vand.L.Rev. 43, 56-57 (1972); Note, *Negligent Interference with Economic Expectancy: The Case for Recovery*, 16 Stan.L.Rev. 664, 689-92 (1964); Note, *Negligent Interference with Contract: Knowledge as a Standard for Recovery*, 63 Va.L.Rev. 813, 818-23 (1977); Comment, *Foreseeability of Third-Party Economic Injuries--A Problem in Analysis*, 20 U.Chi.L.Rev. 283, 286 (1953).

The James article, cited *supra*, has been described as the "most influential treatment of the whole subject" by Owen, *supra*. James heavily criticizes the rule because it denies recovery even when--as is unquestionably clear in the present case--any "pragmatic objections" have little or no application, *Id.* at 57-58, and he suggests that the rule "is a crude and unreliable one that may need reexamination." *Id.*, at 50 -51.

(ii) Why this is the Seminal Case to Revisit *Robins Dry Dock*

No case more graphically illustrates the artificial barriers to justice imposed by that law upon injured maritime plaintiffs and traditional concepts of proximate cause, than this case, where the owner of shops on a cruise ship have been denied recovery while the owner of the cruise ship itself, which includes the same shops, has not, for exactly the same causes of action. No one could argue, under modern concepts of proximate cause or remoteness, not to mention equity (the cornerstone of admiralty law) that these two claims should have wholly different outcomes.

On a substantive level, what this case involves is an error by the government in leaving unmarked, despite having concerns about the area since 1939, in the middle of a buoyed channel off the coast of Rhode Island, a veritable underwater "iceberg"-- a 1300 foot rock ledge the size of four football fields -- looming at a depth of approximately only 30 feet.

In 1993 -- over 50 years later -- one of the world's most magnificent cruise liners, the Queen Elizabeth 2 ("QE2"), struck that uncharted rock ledge, causing over $50 million in damages, including damage to the Petitioners herein, the owners of the consortium of nine high-fashion stores located on the QE2 (and their insurer). Because the QE 2 was under repair after the grounding for nearly two months and not sailing, the concessionaires concededly lost sales and profits of $253,000, a portion of which was not covered by their insurance.

The balance of the $50 million in losses, suffered by the vessel itself, are being pursued in a separate action, filed contemporaneously with this one, *Cunard Line Limited v. United States*, 94 Civ. 5637 (JSM) (THK) (S.D.N.Y.). That companion action is still pending. This one was dismissed.

The Second Circuit Court of Appeals, in a perfunctory opinion, relying upon *Robins Dry Dock*, effectively ruled that while a cruise ship owner can sue for its economic losses stemming from the loss of use of its vessel, the owners of the stores on that same vessel -- despite having suffered virtually identical economic losses, suing under virtually the same causes of action, stemming out of precisely the same events -- are without *any remedy whatsoever*. The artificial construct by which this result was reached by the Court of Appeals (*sub silentio*) and by the District Court, was the conclusion that the store areas on a vessel are not part of the vessel, and that the owners of those stores have no sufficient "proprietary interest" in the exclusive vessel that transports them. The Courts reached this conclusion in the face of an uncontradicted affidavit setting forth that the Appellant shop

owners had run the shops on the QE 2 for 27 years and had recently invested over $10 million in vessel fixtures, in constructing the interior mall space, and in extending its hull.

The Fifth Circuit has reached precisely the opposite conclusion under less compelling circumstances. *Domar Ocean Transportation Ltd. v. M.V. Andrew Martin*, 754 F. 2d 616, 618-619, 1987 AMC 1370 (5th Cir. 1985). The Fifth Circuit in *Domar* ruled that the owner of a barge used as part of an "integrated unit" with a physically damaged tug could maintain a cause of action for economic loss. In *Domar*, the Fifth Circuit found that an investment of $350,000 in a pilot house on the tug was enough to create a proprietary interest and an "integrated-unit." *Id.* at 618-619. The Courts below in their decisions did not distinguish the *Domar* decision; instead they did not address it.

This case would also have been allowed to proceed in the Fourth and Sixth Circuits, which have effectively rewritten *Robins Dry Dock*, in favor of more modern notions of proximate cause that certainly would have allowed for recovery here. *Marine Nav. Sulphur Carriers, Inc. v. Lone Star Industries*, 638 F. 2d 700, 702, 1981 AMC 578 (4th Cir. 1981); *Venore Transportation Co. v. M/V Struma*, 583 F. 2d 708, 710, 1978 AMC 2146 (4th Cir. 1978) (noting that *Robins Dry Dock* is only defensible with respect to "remote claims."); *Bethlehem Steel Corp. v. Marriott Corp.*, 631 F.2d 441, 448-49, 1980 AMC 2822 (6th Cir. 1980) (applying remoteness test), *cert. denied*, 450 U.S. 921 (1981).

Similarly, the Ninth Circuit and other courts have in the past found, for intellectually inexplicable reasons, that fishermen are not barred from recovering their economic losses by *Robins Drydock*. *See Union Oil v. Oppen*, 501 F. 2d 552, 562 (9th Cir. 1974); *Burgess v. M/V Tamano*, 370 F. Supp. 247, 1973 AMC 1939 (D. Me. 1973), *aff'd per curiam*, 559 F.2d 1200 (1st Cir. 1977); *Carbone v. Ursich*, 209 F.2d 178, 1954 AMC 169 (9th Cir. 1953). One logical explanation could be that the livelihood of the fisherman is fully

integrated with the vessels on which they sail. But then again, so is the livelihood of the plaintiff here, Allders, fully integrated with the vessels on which its shops sail.

The Second Circuit's analyses have been wholly inconsistent. *See, e.g., Petition of Kinsman Transit Co.*, 388 F. 2d 821, 823-824 (2d Cir. 1968) (criticizing *Robins Dry Dock* and relying instead on traditional notions of proximate cause). *Cf. Federal Commerce & Navigation Co. v. M.V. Marathonian*, 392 F. Supp. 908 (S.D.N.Y.), *aff'd.*, 528 F. 2d 907 (2d Cir. 1975), *cert. denied*, 425 U.S. 925 , 96 S. Ct. 2176 (1976) (recognizing *Robins Dry Dock's* vitality, as only the Supreme Court can revise it).

If the rulings here are left to stand, a highly meritorious case will end without just recompense, since the government's negligence here (for purposes of this appeal) must be assumed to be admitted.

Moreover, the *Robins Dry Dock* doctrine, and the above split of authorities, will continue to mystify Courts everywhere. Therefore this court must now take the occasion, referred to but passed upon in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, n. 6 at 871, 106 S. Ct. 2295, n.6 at 2302, 90 L.Ed 865, 1986 AMC 2027 (1986), to clarify when purely economic losses are recoverable in admiralty.

Plaintiffs allege that the cost to the government of doing a proper survey and properly charting the rock ledge in Vineyard Sound, thereby avoiding nearly $50 million in damage, would have been at most a few thousand dollars. Plaintiffs seek simply, and thus far have been denied, their day in court to establish that.

B. Proceedings Below

The Second Circuit, in a perfunctory decision, merely ratified the District Court's decision and reasoning (App., A-2 to A-3).

In its decision, the District Court dismissed this action under Fed. R. Civ. P. 12(b)(6) for failing to state a cause of action (App., A-15). That Court apparently reasoned that the QE 2 actually consists of two pieces of property -- the hull and the various bridges (App., A-8 to A-9). And because only the hull, an area where Plaintiff has no stores, had been physically damaged, it concluded that Plaintiff had not suffered any physical loss and thus could not assert a claim for economic losses (App., A-9) -- while presumably, Cunard, the owner of the QE2, could assert such claims.

The District Court did not find that Plaintiffs failed to meet the Fifth Circuit's "proprietary interest" test, but instead misinterpreted the test, ignoring the obvious fact that the shops on the QE2 and its hull are an "integrated unit," and holding that Plaintiffs had to show a proprietary interest in the vessel's damaged hull, rather than the vessel as a whole (App., A-8 to A-9).

C. Statement of Facts

(i) The Facts Concerning The Grounding

Plaintiffs' Complaint alleges that on August 7, 1992, while proceeding through Vineyard Sound from her anchorage at Martha's Vineyard, Massachusetts to New York, the QE 2 grounded on an uncharted 1300 foot ledge located in an apparently safe buoyed channel. The grounding severely damaged the hull of the QE 2 (Jones Affd. ¶ 47; Complaint ¶ 11).[4]

As a direct and proximate result of the QE 2's grounding, several subsequent cruises by the vessel were canceled, while hull repairs were made, and the operation and

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[4] These and similar citations are to matters considered by the District Court and reprinted in the Joint Appendix before the Court of Appeals.

sales of Petitioner Allders' nine retail shops aboard the QE 2 were wholly prevented for 56 days during 1992. The shops are all high-end retail establishments featuring products from Louis Vuitton, Cartier, Asquascutum, Dunhill, Gucci, Harrods and others (Jones Affidavit, ¶ 13, n.3 and ¶ 33). The overall cost in damages to the Plaintiffs was at least £158,536.46 (British pounds, currently, approximately $253,000) (PX-14).

Data warning of said ledge and the correct depth of water over it did not appear on the navigation charts or notices prepared by the U.S., nor did said charts or notices correctly show the least depth of water in the area of grounding (Complaint ¶ 12).

Appellants allege that the hydrographic surveys conducted by US surveyors, which had not been updated since 1939, on which the faulty charts were based, failed to comply with appropriate standards promulgated for and applicable to such hydrographic surveys, including *the standards prescribed as of 1939 by the U.S. itself* (Complaint ¶ 14). Public records indicate that the Hydrographic Manual at that time prescribed that, in addition to routine soundings being taken every 1400 feet in a channel, whenever, as here, one of those sounding shows even a small change from an average depth, it should be considered as an indication of a possible shoal, and a further careful examination of the area undertaken.

Here, Appellants allege and expect to prove at trial that the U.S. hydrographer involved found one shallow point in the channel but failed to survey any such interim points. Instead, while recognizing that a serious risk of a shoal was present, *he placed in the government's file a recommendation to resurvey the area, a recommendation which subsequently lay dormant, without any response or activity, for over 50 years* -- while vessels, like the QE 2, navigated the channel, completely unaware of the danger silently lurking below them.

The charts in use also lacked any indication on them advising when the last survey of the channel had been undertaken (1939) -- a simple fact to include which, if present, would likely have convinced the QE 2 to select a different route, and which omission has since been criticized by federal officials.

In the most insightful study of the causes of the grounding, the well-regarded British Marine Investigation Branch (MAIB), of the British Department of Transport, in what is now a public record, concluded that:

> "The immediate causes of the accident were, therefore, the presence of significantly shallower depths than those charted, together with an overestimation of the height of tide and an underestimation of the effect of squat."[5]

Certainly no one disputes that, having decided to create navigation charts, the Defendant United States had a compelling obligation do it correctly. In the leading case concerning the necessity for accuracy in the preparation of navigation charts and notices, *DeBardeleben Marine Corp. v. United States*, 451 F.2d 140 (5th Cir. 1971), the Fifth Circuit first noted that:

> "The Federal Government has long virtually pre-empted the field of control of navigation including the promulgation of rules of the road and the publication of charts and notices to mariners."

(*Id.*, 451 F. 2d at 147). The Court summed up the government's legal duty in this area, stating:

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[5] Marine Accident Investigation Board, The Department of Transport, *Report of the Investigation into the Grounding of Passenger Queen Elizabeth 2 on 7 August 1992*, Part III Conclusion § 8.2, at 24 (HMSO Crown Copyright 1993).

> These are not just casual publications which may be of interest to or fall into the hands of an indeterminate number of users. These charts are published by the Government with the certain knowledge that they (I) will be disseminated through reliable channels to ships and crews and (ii) will be relied on as accurate portrayals of the waters covered. Indeed this expectation is mandated as a rule of prudent conduct on the part of shipowners."

(*Id.* 451 F. 2d at 148). The Fifth Circuit then held, accordingly, as a matter of federal law (*Id.*, text and n. 7 at 147), that:

> The Government must therefore bear the burden of using due care in the preparation and dissemination of such charts and notices."

Id., 451 F. 2d at 149.

For purposes of this appeal from the granting of a motion to dismiss on the pleadings, before any discovery was taken, the negligence of the U.S. Government, as pleaded, must be deemed admitted. *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99 (1957).

(ii) Allders' Investments and Interest in the QE 2

For the purpose of this Petition, the truth of Plaintiff's well-pleaded allegations concerning their investments and integrated operations within the QE2 must also be presumed.

Mr. Timothy Jones, Allders' Retail Operations Controller, set forth at length in a comprehensive 23 - page affidavit the facts -- which the U.S. did not seek to rebut -- detailing the close and highly integrated nature of the relationship between Allders and Cunard Line, owners of the QE 2, prior to and at the time of the grounding (Jones Affidavit ¶¶ 13-20, 21-31, 32-46).

The Jones Affidavit notes that, pursuant to a series of lease agreements, Alders had been the principal concessionaire on the QE 2 for 27 years -- since 1967 (Jones Affidavit, ¶ 13, JA 69).

Most significantly, in 1987, Allders invested $3.0 million toward the QE 2's interim renovation (*Id.* ¶22), followed by an additional $4.6 million between 1989 and January 1995 (*Id.* ¶¶23-27), which monies completely rebuilt the vessel's internal mall area (in award winning fashion) and even extended, at Allders' expense, her hull. More recently, Allders invested yet another $3.3 million in fixtures on the vessel. (*Id.* ¶ 30). Allders alone cared for, maintained and repaired the interior store spaces on the vessel (*Id.* ¶¶ 29, 31).

In the face of all of the foregoing *undisputed facts*, and without the benefit of any contrary facts, or any discovery, the District Court ruled as a matter of law that Plaintiffs had no "proprietary interest" in the physically damaged QE 2.

SUMMARY OF REASONS FOR GRANTING CERTIORARI

In 1927, nearly 70 years ago, this Court decided *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303, 48 S. Ct. 134 (1927). In that case, this Court limited recovery for damages in admiralty for economic loss to persons who suffered physical damage. Since then many Courts and commentators have been critical of the decision's artificial approach to justice, with conflicting views appearing even within the same circuit. Indeed, as described in the many law review articles,

and the Second, Fourth, Fifth, Sixth and Ninth Circuit and lower court decisions previously cited, *supra,* attempting to keep *Robins Dry Dock* viable nearly 70 years after its issuance has created a labyrinth of conflicting rulings.

Robins Dry Dock itself involved claimed losses by a temporary time charterer of a vessel. It did not involve (much less reflect) claims for direct pecuniary loss caused by damage to persons and entities continuously operating a business on-board the damaged vessel, and who had an on-going, twenty-seven year, multi-million dollar investment in the vessel, the fact situation here. (*See* Jones Affidavit ¶¶ 13-46).

As set forth earlier, the District Court's decision dismissing this action was founded only upon *Robins Dry Dock.* In so ruling, the District Court did not adequately consider, except in passing, recent Fifth Circuit rulings which interpreted *Robins Dry Dock* to hold that a person suffers compensable damage to property if it is part of an "integrated-unit" with the damaged property.

One specific Fifth Circuit case, *Domar Ocean Transportation, Ltd. v. M.V. Andrew Martin*, 754 F.2d 616, 1987 AMC 1370 (5th Cir. 1985), has expressly held that when certain property is utilized as an "integrated unit" with other property physically damaged, the owner of the complementary property does have a sufficient proprietary interest in the damaged property to recover its economic loss. The District Court ignored that precedent, and the obvious applicability of it to this case. Nothing could be more "integrated" with a cruise ship than its own shops. The Ninth Circuit's decision in *Union Oil, supra,* 501 F.2d 552 at 562, similarly recognized (at least implicitly) that fishermen are so closely integrated for their livelihood with their vessels that their claims too are excepted from *Robins Drydock.*

The Court below also narrowly read another exception to *Robins Dry Dock*, also applicable here. That exception, established by the Supreme Court itself in the *Toluma*, supra,

294 U.S. 394, is known as the "common venture at sea" exception. The District Court ruled as a matter of law that the Alders-Cunard Line relationship was not a "common venture," contrary to the many undisputed facts presented below demonstrating the common nature of their venture. In fact, as described below, it simply misread a critical provision in the applicable Allders-Cunard Line contract.

The District Court ignored the fact that the claims here do not derive merely from Allders' contract with Cunard Line -- a critical fact relied upon in the *Toluma* to determine when *Robins Dry Dock* should be applied.

The decisions show that these exceptions to *Robins Dry Dock* -- based upon the existence of an "integrated unit" or of a "common venture at sea" -- involve the court in a highly fact-specific analysis. However, the Courts below summarily rejected the "proprietary interest" exception outright, with minimal or no consideration of the extensive, and entirely uncontroverted, factual proof submitted by Plaintiffs. In doing so, those Courts committed error because they unfairly deprived Petitioners of a decision on the merits of their claim based on the particular facts and circumstances of Allders' activities on board the QE 2.

REASONS FOR GRANTING THE PETITION

The Second Circuit Court of Appeals Wrongly Rejected, *Sub Silentio*, the Fifth Circuit's "Integrated Unit" Exception, as Set Forth in *Domar v. M.V. Andrew Martin*

A. The Second Circuit Erroneously Ignored the "Integrated Unit" Exception to *Robins Dry Dock*

The "integrated unit" exception to *Robins Dry Dock*, which excludes from the doctrine's effects parties who have at least

a proprietary interest in a physically damaged ship, is established in the Fifth Circuit. It is part of a larger group of excepted cases, coming under the "proprietary interest" exception. The Fifth Circuit has specifically defined what constitutes a "proprietary interest,"[6] stating:

> "the requirements for proprietary interest are actual possession or control, responsibility for repair and responsibility for maintenance [of the damaged property]. [citations omitted]"

IMTT Gretna v. Robert E. Lee SS., 993 F.2d 1193, 1194 (5th Cir. 1993).

Factually, the case most analogous to this one is *Domar Ocean Transportation, Ltd. v. M.V. Andrew Martin*, 754 F.2d 616, 1987 AMC 1370 (5th Cir. 1985). In *Domar*, the Fifth Circuit allowed recovery of economic loss (including loss of optimal use, and revenues) for a tug chartered (but not owned) by plaintiff, the barge owner. The tug was not physically damaged by defendant's tort, but the owner's barge utilized with the tug was physically damaged. The Court held that because the barge owner had paid for the construction of a raised pilot house on the tug, at a cost of $350,000, specifically so that the tug and barge could be used together, and because plaintiff operated the tug and barge as

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[6] Utilizing this test, in *Bosnor, S.A. de C. v. Tug L.A. Barrios*, 796 F.2d 776,783 (5th Cir. 1986), the Fifth Circuit further held, following the logic implicit in the *Robins Dry Dock* decision, that a long-term bareboat charterer of a vessel has the "sufficient proprietary interest" to escape *Robins* and recover its actual economic damages (including lost profits). *See also Texas Eastern Transmission Corp. v. McMoran Offshore Exploration Co.*, 877 F.2d 1214, 1225 (5th Cir.), *cert. denied*, 493 U.S. 937, 110 S. Ct. 332 (1989) (noting the significance of a "tangible contribution to the property for which it contracted" in establishing "proprietary interest").

an "integrated unit" (*Id.*, 754 F. 2d at 619), plaintiff had a sufficient "proprietary interest" in the damaged tug.

Like the tug-barge combination in *Domar*, it is beyond dispute that the Allders shops were operated as an "integrated unit" with the vessel QE 2 -- indeed, they are operated and advertised to QE2's passengers as an integral "attraction" and part of the QE 2. Simply put, the QE2's shops could not sail without the vessel, and the vessel would not sail without its retail shops, because the QE2's shops are indisputably crucial to the ship's and voyage's revenues and profits (Jones Affidavit, ¶¶ 9-12, 32-38, JA 67-69, JA 78-80; Plaintiffs' Rule 3(g) Statement ¶¶ 6-11, 15-23, JA 53-54, JA 55-57). In fact, Allders' shops have recently contributed over $1,000,000 annually to QE 2's voyage revenues in recent years (Jones Affidavit ¶ 20, JA 72; Plaintiffs' Rule 3(g) Statement to ¶¶ 18-21, JA 56).

Allders meets the Fifth Circuit's larger "proprietary interest" test, quoted *supra*, because under its various concession agreements Allders had "actual possession and control" of its nine retail shops and related storage areas on-board the QE 2. Allders "controlled" the shops because it had the exclusive legal right to occupy and use the shops, under its Concession Agreements with Cunard, and Allders employees actually occupied and used them in Allders' daily business of selling goods to QE2's passengers (Jones Affidavit, ¶¶ 28-31, JA 76-78). Allders' on-board employees installed the locks on the doors, and closed and locked the QE 2's retail shops at certain hours determined by Allders (Jones Affidavit ¶30, JA 77; Plaintiffs' Rule 3(g) Statement ¶¶ 29-33, JA 59-61). Allders also bought, installed, owned and used shop fixtures, fittings and counters used in the shops at very substantial expense -- having an estimated value at August 7, 1992 equivalent to approximately U.S. $3.3 million (Jones Affidavit ¶28, JA 76). Allders also had the exclusive obligation to "repair and maintain" its portion of the vessel -- the shops -- and over the years budgeted thousands of dollars

to do so (Jones Affidavit ¶29, JA 77). The District Court simply ignored all these facts.

Finally, like the Plaintiff in *Domar*, but spending much more than the $350,000 involved there, Allders has made large capital expenditures in and actually constructed a large portion of the QE 2, including its hull extension, at an aggregate cost over $10 million over eight recent years. (Jones Affidavit ¶¶21-30, JA 73-77; Plaintiff's Rule 3(g) Statement ¶¶ 24-28, JA 57-59). That, in itself, makes the shops an "integrated unit" with the QE 2, and creates a sufficient "proprietary interest" in the vessel within the meaning of *Domar*.

These are all seminal facts that the Second Circuit Court of Appeals, in affirming the District Court, also failed to fully credit or consider.

The Courts below should not have dismissed the Complaint unless it appeared beyond a doubt that plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, (1957); *Plaza Marine Inc. v. Exxon Corp.*, 814 F. Supp. 334, 335 (S.D.N.Y. 1993)(Keenan D.J.). These principles apply equally in the *Robins Dry Dock* context. *Holt Hauling & Warehousing System Inc. v. M.V. Ming Joy*, 614 F. Supp. 890, 899-900 (E.D. Pa. 1985) (evidence that stevedore rather than lessee performed routine maintenance, purchased insurance and paid utilities on pier it had leased to lessee, created issue of fact avoiding summary judgment as to whether Stevedore had sufficient proprietary interest to recover for stevedoring and related revenues lost due to damage to pier).

At the least, the Affidavit which Petitioner submitted with its annexed Exhibits created an issue of fact, concerning Allders' massive investment and possible "proprietary interest" in the QE 2, which should have been determined by trial.

In contrast, the Fifth Circuit's adoption of the "proprietary interest" definition in interpreting *Robins Dry Dock* makes sense both as a matter of law and matter of policy. It has been noted that the chief purpose of the unique *Robins Dry Dock* rule, which does not follow a contemporary proximate cause and remoteness analysis, was "to prevent numerous claims of economic damage from parties the tortfeasor did not know he owned any duty to." *IMTT - Gretna v. Robert E. Lee SS*, 993 F.2d 1193, 1194 (5th Cir. 1993) (emphasis added). Virtually all authorities concur that this is its sole purpose and justification. *Barber Lines A/S v. M/V Danau Maru*, 764 F.2d 50, 52 (1st Cir. 1985) (*Robins* remains legally sound because applied to plaintiffs "outside the scope of those to whom defendant owes a legal duty of care.") (emphasis added). Thus, the main (if not only) justification for *Robins* is what one leading admiralty scholar has called the "problem of controlling the floodgates of economic loss...." W. Tetley, *Damages and Economic Loss in Marine Collision: Controlling the Floodgates*, 22 J. Mar. L & Com. 539, 584 (1991).

However, when the potential Plaintiffs, as here, are strictly limited to parties regularly operating retail shops on board of and connected to the damaged vessel, no such "floodgate" problem is presented.

As noted earlier, the economic losses of commercial fisherman, who must, as Allders does, utilize navigable vessels for their own form of merchandizing, have been held cognizable. *Union Oil v. Oppen*, 501 F.2d. 558, 568 (9th Cir. 1974). That decision did not create any flood of litigation.

B. The Second Circuit Erroneously Applied the "Common Venture At Sea" Exception to *Robins Dry Dock*.

Besides the "proprietary interest" test used to interpret *Robins Dry Dock*, there is yet another major factual exception

to the Doctrine, the "common venture at sea" exception. Appellants also come within that exception, although the Courts below also failed to so find.

In *Aktieselskabet Cuzco v. The Sucarseco* ("The Toluma"), 294 U.S. 394, 55 S. Ct. 467 (1935), issued by this Court eight years after its *Robins Dry Dock* decision, the owners of cargo which was not physically damaged, but which was carried on a vessel which collided with another vessel, sued the non-carrying vessel to recover their economic damages (general average payments) resulting from the collision. *Id.*, 294 U.S. at 403, 55 S. Ct. at 470. In that case, the Second Circuit below had rejected the argument that this economic loss could not be recovered because of *Robins Dry Dock*, holding instead that the non-carrying vessel's collision "was a direct contributing cause of the loss which was sustained by cargo." The Second Circuit had further ruled that the cargo's loss did not stem solely from a contract with one directly injured, because cargo owner and vessel were equally engaged in "a common venture at sea." *The Toluma-The Sucarseco*, 72 F. 2d 690, at 693 (2d Cir. 1934), *aff'd. sub nom., Aktieselskabet Cuzco v. The Sucarseco*, 294 U.S. 394, 55 S. Ct. 467 (1935).

The Supreme Court affirmed, and it agreed that the cargo owners' right arose from their own risk of collision at sea, rather than from the rights of the carrying vessel, since the cargo owners were participating in a "common venture at sea:"

> "The claim of the cargo owners for their general average contributions *is not in any sense a derivative claim. It accrues to the cargo owners in their own right.* It accrues because of cargo's own participation in the common adventure. . . . Being cargo's own share of the expense incurred in the common interest, the amount which is paid properly belongs in the category of damage which the cargo owners have suffered by reason of the collision."

Id., 294 U.S. at 404, 55 S. Ct. at 471. (emphasis added). The Supreme Court then explicitly held that *Robins Dry Dock* did not bar recovery of economic loss suffered in such a common venture:

> "The contention as to remoteness is but another way of presenting the same question. This is not a case of an attempt, by reason of a "tort to the person or property of one," to make the tort-feasor liable to another "merely because the injured person was under a contract with that other, unknown to the doer of the wrong." See *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 309, 48, **** [citations omitted]. Here, cargo as well as ship was placed in jeopardy. That jeopardy was due in part to the negligence of the vessel against which the claim is made."

Id., 294 U.S. at 404, 55 S. Ct. at 471. The Court in *The Toluma* thus went on to allow the cargo interests to recover their economic losses in full. *Id.*, 55 S. Ct. at 472.

The *Toluma* rule remains viable, and unlike the *Robins Dry Dock* doctrine, largely uncontroversial, today. As the Fifth Circuit stated in 1986:

> "The rule has been applied even when the cargo did not suffer any immediate physical damage in the collision. [citations omitted] *This rule is founded on the notion of a "common venture," according to which ship and cargo share by law in certain of the risks, rights, and responsibilities of a voyage*; the law of general average is the context in which the common venture most often applies."

Cargill, Inc. v. Doxford and Sunderland, Ltd., 785 F. 2d 1296, 1297 (5th Cir. 1986) (emphasis added). *See also Amoco Transport Co. v. S.S. Mason Lykes*, 768 Ford 659, 667 (5th Cir. 1985). The Fifth Circuit in *Mathieson v. M/V Obelix*, 817 F.2d 345, 348 (5th Cir.), *reh. denied* (5th Cir.),

cert. denied, 484 U.S. 898, 108 S. Ct. 234 (1987), again recognized that the *Robins Dry Dock* doctrine does not bar recovery of losses by an owner of cargo, but declined to recognize such economic damage if it was caused by a collision occurring prior to the time the cargo loaded.

Here, Allders' business (and the property used in it), just like the cargo in the Toluma, was at all times (in fact, for 27 years) located on board Cunard Line's cruise vessel while it traveled navigable waters. So, clearly, the two -- Allders and Cunard-- were engaged in a form of "common venture, at sea."

Here, the Courts below did not dispute the viability of the "common venture at sea" exception to *Robins Dry Dock*. Instead, they effectively ruled that the doctrine only exists in the general average context, again, an artificial construct that has no rhyme or reason. (App., at A-10 to A-12). In fact, the record below will show that the District Court reached this result only after misreading the terms of Allders contract with Cunard Line, which, contrary to the conclusion reached in the opinion, does bar Allders from suing Cunard itself for damages caused by a "grounding" (App., at A-12, n. 3). Thus Allders and Cunard Line did jointly share the maritime "risks" of the voyage.

In other cases where, as here, a party has in effect been made an insurer of a shipowner's negligence, recovery under *Robins Dry Dock* has been allowed. *M & J Tracy, Inc. v. The Rowen Card*, 116 F. Supp. 516, 1953 AMC 1700 (E.D. N. Y. 1953); *United States v. Panama Transport Co.*, 268 F. 2d 739, 1959 AMC 1441 (2d Cir. 1959), *aff'g*, 174 Supp. 592, 1959 AMC 1435 (S.D.N.Y. 1959).

Nor can it be said that Appellants claim here is "derivative" of Cunard Line's claim, as stemming solely from a breach of contract with Cunard Line. Appellants lost revenue because they lost their opportunity to make independent sales directly to passengers, not to Cunard Line. That is a critical factor since in both *Robins Dry Dock, supra*

275 U.S. at 308, 48 S. Ct. at 135, and the *Toluma, supra*, 294 U.S. at 404, 55 S. Ct. at 471 (as noted above), it is relied upon to distinguish those claims which are barred. That fact, again ignored by the Courts below, also strongly distinguishes this case from *Robins Dry Dock*.

In the Robins Dry Dock decision, Justice Holmes repeatedly notes that the tortfeasor in question had no way of knowing of the charter in question. In contrast, even in the 1930's, passenger cruise ships were widely popular. Any person preparing navigational charts must have expected cruise ships to use them, and must further have expected those cruise ships to have retail shops on board to serve their passengers. There can thus be no question that this defendant knew it owed a duty of care not only to the owners of such cruise vessels using its charts but also to all those lawfully traveling upon it -- including any cargo owners, passengers, crew and, in this instance, such vessel's retail shop concessionaires.

Thus Appellants come within both the "integrated unit" exception to *Robins Dry Dock* as described by the Fifth Circuit in *Domar*, and within the "common venture" exception as described by this Court in *The Toluma*.

CONCLUSION

The Petition for a writ of certiorari is meritorious, and should be granted. After 70 years, the time has come for this and future maritime losses to be guided by the hand "of the present."

Respectfully submitted,
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April 15, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City and County of New York, on the 16 day of January one thousand nine hundred and ninety-six.

PRESENT: HONORABLE JOSEPH M. McLAUGHLIN,
HONORABLE DENNIS G. JACOBS,
HONORABLE GUIDO CALABRESI,
Circuit Judges.

ALLDERS INTERNATIONAL (SHIPS) LTD.,
and EAGLE STAR REINSURANCE CO., LTD.,

Plaintiffs-Appellants,

- v. -

No. 95-6138

UNITED STATES OF AMERICA,

Defendant-Appellee.

FOR APPELLANTS: Lawrence C. Browne, Maloof & Browne, New York, NY.

FOR APPELLEE: David V. Hutchinson, Assistant Director, Admiralty, United States Department of Justice, Washington, DC.

Appeal from the United States District Court for the Southern District of New York (Martin J.).

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued.

ON CONSIDERATION WHEREOF, it is hereby ordered, adjudged, and decreed that the judgment of the district court be and it hereby is AFFIRMED.

Allders International (Ships) Ltd. ("Allders") operates nine retail shops aboard the cruise ship Queen Elizabeth 2 ("QE2"). In August, 1992, the QE2 struck a rock ledge off the coast of Martha's Vineyard, Massachusetts. The rocks ripped several large gashes in the QE2's hull, and the ship required extensive repair. As a result, the QE2 had to cancel scheduled cruises, which deprived Allders of the opportunity to sell its wares to cruise customers.

Alleging that the cause of the QE2's grounding was the negligence of a federal hydrographer who, in 1939, left the rock ledge unmarked on government navigation charts, Allders sued the United States government in the United States District Court for the Southern District of New York (John S. Martin, Jr., Judge). Allders sought to recover $253.000 in damages, the amount of profits Allders claimed it lost through cancellation of the cruise.

The district court granted the government's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). holding that Allders' claims were barred by the doctrine of Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927), and related cases. We affirm for substantially the same reasons set forth in Judge Martin's Memorandum Opinion and Order dated April 28, 1995 (reported at 1995 A.M.C. 1660; 1995 WL 251571). We have considered all of the additional arguments raised by Allders, and find them to be without merit.

Accordingly, the decision of the district court is AFFIRMED.

HON. JOSEPH M. McLAUGHLIN

HON. DENNIS G. JACOBS

HON. GUIDO CALABRESI

Circuit Judges.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALLDERS INTERNATIONAL (SHIPS) LTD.
and EAGLE STAR REINSURANCE CO., LTD.,

Plaintiffs,

v.

UNITED STATES,

Defendant.

JOHN S. MARTIN, JR., District Judge:

In this admiralty case, plaintiff Allders, a retail shops concessionaire aboard the M/V QUEEN ELIZABETH II ("QE2"), seeks to recover economic damages resulting from the QE2's cancellation of cruises during repairs after an accidental grounding in August 1992. Now before the Court is defendant's motion to dismiss.

The primary issue to be decided is whether the Supreme Court's holding in Robins Dry Dock & Repair v. Flint, 275 U.S. 303, 48 S. Ct. 134 (1927), governs this case. Because plaintiff does not claim physical injury to its

property and no special circumstances are present to warrant an exception to Robins Dry Dock, plaintiff's action is not sustainable and defendant's motion is granted.

1. General Maritime Tort Doctrine: Robins Dry Dock

Under general maritime tort doctrine, recovery is barred for economic loss in the absence of physical harm. In Robins Dry Dock, the leading "pure financial injury" case, a time charterer sued to recover profits lost when the defendant dry dock negligently damaged the vessel's propeller. Id. at 309. The charterer sued for its loss of the use of the vessel during the ensuing two week delay. Id. The Supreme Court denied recovery, holding that the charterer's loss arose only as a result of the lost benefit of the contract and that the plaintiff had no protected interest in the vessel itself. Justice Holmes, writing for the Court, stated:

> As a general rule...a tort to the person or property of one man does not make the tort feasor liable to another merely because the injured person was under a contract with that

> other, unknown to the doer of the wrong...The law does not spread its protection so far.

Id.

Most courts have read Robins Dry Dock to establish a bright line rule against recovery for economic loss caused by an unintentional maritime tort absent physical damage to property.[1] See, e.g., Getty Refining & Marketing Co. v. MT Fadi B, 766 F.2d 829 (3d Cir. 1985); State of Louisiana v. M/V TESTBANK, 752 F.2d 1019 (5th Cir. 1985) (in banc); cert denied, 477 U.S. 903, 106 S. Ct. 3271 (1986). These courts have "discarded traditional tort precepts of foreseeability and lack of remoteness in this limited class of cases." Getty, 766 F.2d at 832. Read in this manner, Robins Dry Dock places certain plaintiffs "'outside the

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[1] The rule of Robins Dry Dock has been explained this way:

> [I]f defendant A negligently injuries the property of party B, and party C suffers economic loss because he had a contract with B which was rendered less profitable...C has no cause of action in tort against A.

Comment, 60 Tulane Law Review 995. 1005 n.49 (1986).

scope' of those to whom defendant owes a legal duty of care." See Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 56 (1st Cir. 1985).

There is dicta in the Second Circuit's opinion in Petition of Kinsman Transit Co. ("Kinsman II"), 388 F.2d 821 (2d Cir. 1968), which has been read as indicating that the Second Circuit has departed from the rule of Robins Dry Dock, relying instead on traditional tort notions of proximate cause. Notwithstanding Kinsman II, courts in this circuit have continued to follow Robins Dry Dock. See, e.g., Plaza Marine, Inc. v. Exxon Corp., 814 F. Supp. 334, 335 (S.D.N.Y. 1993); American Dredging Co. v. Plaza Petroleum Inc., 845 F. Supp. 91 (E.D.N.Y. 1993); Federal Commerce & Navigation Co. v. M/V Marathonian, 392 F. Supp. 908 (S.D.N.Y.) (expressing preference for Kinsman II approach but following Robins Dry Dock), aff'd, 528 F.2d 907 (2d Cir. 1975) (recognizing continued vitality of Robins Dry Dock), cert. denied, 425 U.S. 975 (1976).

Although criticized from time to time, Robins Dry Dock remains good law, and there is no question but that "the Supreme Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom." Federal Commerce, 528 F.2d at 907.

A. Accompanying Harm

Plaintiff argues that it may recover for its economic harm because it has also suffered physical damage to a proprietary interest. Specifically, plaintiff Allders claims that because it spent more than $7.6 million for improvements in the QE2's interior mall area and fixtures, it has a substantial pecuniary interest in the QE2 and therefore suffered physical harm. Jones Aff. ¶ 27. It is undisputed that the expenditure of these monies was required by the terms of plaintiff's rental contracts with Cunard Lines, Inc., which owns the QE2. In fact, Cunard was required to return a pro rata share

of these monies if Cunard terminated the contract before the expiration of its term. 1987 Agreement ¶ 5.4.

A proprietary interest requires "actual possession or control, responsibility for repair and responsibility for maintenance." Texas Eastern Transmission Co. v. McMoran Offshore Exploration Co., 877 F.2d 1214, 1225 (5th Cir.), cert. denied, 493 U.S. 937, 110 S. Ct. 332 (1989); IMTT-Gretna v. Robert E. Lee SS, 993 F.2d 1193, 1194 (5th Cir. 1993). Even if plaintiff had "actual possession and control" of the nine retail shops and storage areas on-board the QE2 as well as an obligation to "repair and maintain" them, however, this proprietary interest in the shops cannot also constitute an interest in the whole of the damaged vessel. Therefore, because the shops were not damaged, plaintiff suffered no physical damage and cannot escape the rule of Robins Dry Dock.

II The Toluma: Common Venture at Sea

If plaintiff were engaged in a "common venture at sea" with Cunard, the Robins Dry Dock doctrine would not apply to plaintiff's loss and recovery would be permitted. Aktieselskabet Cyzco v. The Sucarseco ("The Toluma"), 294 U.S. 394, 55 S. Ct. 467 (1935); Amoco Transport Co. v. S/S Mason Lykes, 768 F.2d 659 (5th Cir. 1985); see Jones Aff. ¶¶ 13-20. 32-46. In The Toluma, the leading common venture case, the Supreme Court distinguished Robins Dry Dock and held that the tortfeasor did not injure the cargo owner "merely because he had contracted with the one directly injured"; rather, the cargo owners' right arose from its own risk at sea because of its participation in a common venture.

In both The Toluma and Amoco, cargo was carried under a general average statement that "apportioned the expenses and losses, so far as they were of a general average nature, between the owner of the Toluma and the cargo

owners."[2] Therefore, the cargo interests sued for recovery of their general average contributions.

A. No Common Venture

The relationship between plaintiff and Cunard does not embrace the notion of "common venture" shown by the participants in the voyage of the Toluma. In the usual "common venture" situation, ship and cargo share by law in certain of the risks, rights, and responsibilities of a voyage. Cargill, Inc. v. Doxford & Sunderland, Ltd., 785 F.2d 1296, 1297 (5th Cir. 1986). Typically, this relationship is demonstrated by the existence of a Jason clause. Recovery is therefore allowed to compensate for the party's increased exposure to risk:

> The claim of the cargo owners for their

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[2] Commonly known as a "Jason clause," the provision required a contribution "in general average" that made all participants in the maritime venture ratably responsible for losses incurred for their common good. Thus, cargo owners were obligated to contribute in general average in cases of danger, damage, or disaster resulting from faults or errors in navigation or in management of the vessel provided that the shipowner exercised due diligence to make the vessel seaworthy and to have her properly manned, equipped, and supplied.

> general average contributions is not in any sense a derivative claim. It accrues to the cargo owners in their own right. It accrues because of cargo's own participation in the common adventure...Being cargo's own share of the expense incurred in the common interest, the amount which is paid properly belongs in the category of damage which the cargo owners have suffered by reason of the collision.

The Toluma, 294 U.S. at 404, 55 S, Ct. at 471.

Plaintiff has offered no evidence of an arrangement subjecting it to risks comparable to the general average responsibility of the plaintiffs in The Toluma and Amoco.[3] Moreover, plaintiff's lesser responsibilities to Cunard are suggested by its claim to recover lost profits rather than general average expenses. Nonetheless, plaintiff asserts common venture status on the ground that Allders independently procured marine insurance. Jones Aff. ¶¶ 45-

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[3] Nothing in the 1987 Agreement, which governed the parties at the time of the accident, provided for a sharing of the risks of marine perils. Although plaintiff could not make claims against Cunard for certain losses that were the result of circumstances beyond Cunard's control, Cunard may have been liable to plaintiff for damages resulting from its own negligence in navigation.

46, Exh. 13. However, this fact is insufficient to show that Allders "would have been required to share liability for negligence in the navigation of QE2 in the event of a collision." Def. Reply Mem. at 7.

Plaintiff Allders is more similar to the time charterer in Robins Dry Dock than to the cargo interests in The Toluma. Both in the present case and in Robins Dry Dock, the damage prevented plaintiff from reaping the benefit of its contract. Plaintiff in Robins Dry Dock was a time charterer. Plaintiff Allders is also appropriately considered a time charterer, though its charter is for only part of the vessel.[4] During oral argument on the motion, plaintiff disputed this characterization of Allders on the ground that the charter was not for a specified period of time. However, after approximately seven years, the 1987 Agreement between

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[4] Plaintiff paid a percentage of its profits to Cunard for the right to run its stores on the QE2, but plaintiff did not share in Cundard's profits for the running of the vessel. Thus, plaintiff's payments were essentially the payment of rent.

Allders and Cunard was to be renewed on an annual basis. 1987 Agreement ¶¶ 5.0-5.1.

The bright line approach is a pragmatic approach intended to avoid a "chain reaction" of economic injuries that "may produce an unending sequence of financial effects best dealt with by insurance, or by contract, or by other business planning devices." Getty, 766 F.2d at 832 (citing W. Prosser & W. Keeton, The Law of Torts 1001 (5th Ed. 1984)). In both Robins Dry Dock and the present case (1) plaintiff had a contract with the shipowner, (2) plaintiff sued for lost profits flowing from that contract, (3) the damage allegedly was caused by defendant's negligence, and (4) plaintiff's harm was purely financial. Plaintiff's claim is essentially one for negligent interference with performance of its contract and therefore falls squarely within the prohibition of Robins.

For the foregoing reasons, defendant's motion to dismiss is granted.

SO ORDERED.

Dated: New York, New York
April 26, 1995

JOHN S. MARTIN, JR., U.S.D.J.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALLDERS INTERNATIONAL (SHIPS) LTD.
and EAGLE STAR REINSURANCE CO., LTD.,

Plaintiffs,

v.

UNITED STATES,

Defendant.

JOHN S. MARTIN, JR., District Judge:

Plaintiffs' motion for reconsideration and reargument is denied.

SO ORDERED.

Dated: New York, New York
May 17, 1995

JOHN S. MARTIN, JR., U.S.D.J.

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Supreme Court, U. S.
FILED
JUN 24 1996
CLERK

No. 95-1711

In the Supreme Court of the United States

OCTOBER TERM, 1995

ALLDERS INTERNATIONAL (SHIPS) LTD., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
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QUESTION PRESENTED

Whether a cruise ship concessionaire's claim for lost business expectancy (profits) without any physical impact to its property is prohibited in admiralty by *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303 (1927).

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-3a) is unpublished, but the decision is noted at ___ F.3d ___ (Table), 1996 WL 19149. The opinion of the district court (Pet. App. 4a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1996. The petition for a writ of certiorari was filed on April 15, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(c).

STATEMENT

1. Petitioners are Allders International (Ships) Ltd. and Eagle Star Reinsurance Co., Ltd., its

insurer.[1] The QUEEN ELIZABETH II (QE2) is a cruise ship owned by Cunard Line Ltd. (Cunard). Petitioner operates nine retail shops on board the QE2. Pet. App. 2a, 8a.

Petitioner entered into a concessionaire's agreement with Cunard on February 17, 1987, for the right to sell products on board the QE2. C.A. App. A143-A166. Petitioner agreed to contribute money towards the renovation of the shop area on the QE2. *Id.* at A144-A145. At the conclusion of each voyage, Cunard was entitled to retain a percentage of petitioner's "Gross Receipts." *Id.* at A155. Under its agreement with petitioner, Cunard was not

> liable for failure to perform any obligation under th[e] Agreement or for any loss to [Petitioner] or others to the extent that such performance is prevented or loss is caused by Acts of God, war, fire, collision, directions of underwriters, arrest, order or restraint by governmental authorities or others, acts of terrorism, labor disturbances or disputes, civil commotions, weather conditions and considerations of the safety of the vessel * * *, foundering of the vessel or breakdowns of or damage to its hull, machinery and fittings, acts, neglect or default by the Master, pilots, officers, crew or other servants of Cunard in the navigation or management of the vessel, inability to secure or failure of supplies including fuel, requisition of the

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[1] Although Allders International and its insurer, Eagle Star Reinsurance Co., are petitioners, this case arises out of the activities of Allders, and we therefore refer to Allders as "petitioner."

vessel or other circumstances beyond Cunard's control.

Id. at A160-A161.

On August 7, 1992, the QE2 touched rocks and/or boulders on the bottom of Vineyard Sound near Martha's Vineyard, Massachusetts. The QE2 was damaged by the contact and was out of service for a period of time for repairs. As a result of cruise cancellations during this period, petitioner sustained economic losses. Pet. App. 2a; C.A. App. A23. Petitioner sued the United States to recover $253,000 in damages, the amount of profits petitioner claimed it lost from the cancellations. Pet. App. 2a.[2] Petitioner claimed that the QE2's grounding was caused by the negligence of a federal hydrographer who left the rock ledge unmarked on government navigation charts in 1939. *Ibid.*[3]

2. The district court granted the United States' motion to dismiss petitioner's complaint. The court held that the dispositive issue was whether petitioner can recover for economic loss in the absence of physical harm. Pet. App. 4a. The district court recognized that the leading case on this issue is this Court's decision in *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303 (1927). As the district court noted, in *Robins* the defendant dry dock negligently damaged a vessel's propeller. The time charterer of the vessel sued for loss of use of the vessel for the extra time it was laid up in dry dock for the repair of the propeller. In

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[2] Petitioners' appendix erroneously reprints the amount as "$253.000." Pet. App. 2a.

[3] Cunard has filed a separate action for its losses, estimated at close to $50 million. That action is still pending. *Cunard Line Ltd.* v. *United States*, 94 Civ. 5637 (S.D.N.Y.).

denying recovery, Justice Holmes noted for the Court that

> as a general rule * * * a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. The law does not spread its protection so far.

Id. at 309 (citation omitted) (quoted in Pet. App. 5a-6a).

The district court also noted that "[m]ost courts have read *Robins Dry Dock* to establish a bright line rule against recovery for economic loss caused by an unintentional maritime tort absent physical damage to property." Pet. App. 6a, citing *Getty Ref. & Mktg. Co.* v. *MT FADI B*, 766 F.2d 829 (3d Cir. 1985); *Louisiana ex rel. Guste* v. *M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985) (en banc), cert. denied, 477 U.S. 903 (1986).

The court also rejected petitioner's claims that it suffered physical damage to a proprietary interest, Pet. App. 8a-9a, and that it was engaged in a "common venture at sea" which would preclude *Robins Dry Dock* from applying to its loss, *id.* at 10a-13a.

Hence, the district court concluded that

> [i]n both *Robins Dry Dock* and the present case (1) plaintiff had a contract with the shipowner, (2) plaintiff sued for lost profits flowing from that contract, (3) the damage allegedly was caused by defendant's negligence, and (4) plaintiff's harm was purely financial. Plaintiff's claim is essentially one for negligent interference with perfor-

> mance of its contract and therefore falls squarely within the prohibition of *Robins*.

Pet. App. 14a.

3. The court of appeals affirmed in an unpublished summary order, Pet. App. 1a-3a, for "substantially the same reasons set forth in [the district court's opinion]." *Id.* at 3a. It also "considered all of the additional arguments raised by [petitioner], and f[ou]nd them to be without merit." *Ibid.*

ARGUMENT

1. The courts below correctly held that *Robins Dry Dock* applied to bar the relief petitioners sought.[4] Petitioner had a contract with Cunard for a space charter of retail shops aboard the QE2. Petitioner here is akin to a time charterer of less than the complete vessel. See *Pacific Vegetable Oil Corp.* v. *M/S NORSE COMMANDER*, 264 F. Supp. 625 (S.D. Tex. 1966). Under *Robins Dry Dock*, a time charterer of the QE2 would have no claim against the government arising out of its grounding. The charterer of less than the complete vessel should be in no better position.

Petitioner's claim here is for lost profits arising out of interference with its space charter with

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[4] Under admiralty law, petitioner may pursue maritime remedies against the United States that would be available against a private party in like circumstances, tempered by other applicable federal law. Under the Suits in Admiralty Act, 46 U.S.C. App. 741 *et seq.*, the government has waived its sovereign immunity for maritime causes of action that do not involve government vessels or cargo but that would be within the admiralty jurisdiction if private parties were involved. See *Canadian Pac. (Bermuda) Ltd.* v. *United States*, 534 F.2d 1165, 1168 (5th Cir. 1976).

Cunard. In its complaint petitioner alleges that, because of the "fault, negligence and breach of duty" of the United States, the QE2 was caused to ground, and that as a result of that grounding "several subsequent cruises by the QE2 were cancelled, and the operation" of the retail shop was prevented. C.A. App. A24. The claim submitted to petitioner's insurer was for "loss of profits." *Id.* at A250. Petitioner has made no claim for any physical damage to any property. As the courts below correctly concluded, petitioner's claim is "for negligent interference with performance of its contract" with Cunard. Pet. App. 14a.

Petitioner is a purely "financial" plaintiff. *Barber Lines A/S* v. *M/V DONAU MARU*, 764 F.2d 50, 54 (1st Cir. 1985). It is a renter of space on the QE2, the rent for which is a percentage of the gross receipts of its shops at the end of the voyage. During the period that the QE2 had no voyages because of the grounding, petitioner owed Cunard nothing. The grounding in this case interfered only with petitioner's business expectancy. As the courts below correctly held:

> In both *Robins Dry Dock* and the present case (1) plaintiff had a contract with the shipowner, (2) plaintiff sued for lost profits flowing from that contract, (3) the damage allegedly was caused by defendant's negligence, and (4) plaintiff's harm was purely financial. Plaintiff's claim is essentially one for negligent interference with performance of its contract and therefore falls squarely within the prohibition of *Robin*.

Pet. App. 14a.

2. The *Robins Dry Dock* rule has endured repeated examination, challenge, and reevaluation. It has been followed by courts and embraced by commentators.

Thus, while the Ninth Circuit in *Channel Star Excursions, Inc.* v. *Southern Pacific Transportation Co.*, 77 F.3d 1135 (1996), recently acknowledged that it had made "limited exceptions" to the *Robins Dry Dock* rule, it also stated that the "rule has been strictly followed in the First, Second, Third, Fourth, Fifth and Eleventh Circuits." *Id.* at 1138, citing *Barber Lines A/S, supra.*[5]

3. Petitioner contends (Pet. 7) that the court of appeals' decision is contrary to decisions of other courts of appeals. That contention is mistaken.

a. Petitioner asserts (Pet. 7) that there is a conflict between the judgment in this case and *Domar Ocean Transportation Ltd.* v. *M/V ANDREW MARTIN*, 754 F.2d 616 (5th Cir. 1985). Petitioner argues (Pet. 15-19) that it has a sufficient proprietary interest in the QE2 to come within that case's "integrated unit" exception to *Robins Dry Dock*. Petitioner, a tenant of the QE2, made improvements to the shop spaces as one term of its rental

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[5] The Second Circuit considered the applicability of the *Robins Dry Dock* rule in *Federal Commerce & Navigation Co.* v. *M/V MARATHONIAN*, 528 F.2d 907 (1975), cert. denied, 425 U.S. 975 (1976), and, observing that there is no "indication that the Supreme Court has moved away from the *Robins* rule," explicitly held that plaintiffs could not recover for economic loss absent damage to their property. *Id.* at 908. The First Circuit wrote that the principles underlying *Robins Dry Dock* were legally sound and rested on a "firm policy foundation," noting that the same judges who chose to remove other recovery limitations left this one in place. *Barber Lines A/S*, 764 F.2d at 53. The Third Circuit adhered to this rule which, the court noted, was defined by Justice Holmes in *Robins*, incorporated in the Restatement (Second) of Torts § 766C (1977), and embraced by leading commentators. *Getty Ref. & Mktg. Co.*, 766 F.2d at 830-832.

agreement; petitioner contends that it thereby gained an ownership interest in the QE2.

Petitioner's funding of improvements to the QE2, however, is not like the alterations to the vessel that *ANDREW MARTIN* held sufficed to create an "integrated unit." In *ANDREW MARTIN*, Domar Ocean Transportation chartered a vessel, the CINDY CENAC, and altered its design to make it suitable for use with Domar's barge DOMAR 7001. 754 F.2d at 617-618. When damage to the DOMAR 7001 barge prevented use of the CENAC by Domar, the court allowed Domar to recover for lost use of the CENAC. *Id.* at 621.

ANDREW MARTIN was explained in *Texas Eastern Transmission Corp.* v. *McMoRan Offshore Exploration Co.*, 877 F.2d 1214, 1225 (5th Cir.), cert. denied, 493 U.S. 937 (1989). In that case, Marathon Oil, a petroleum production company, sought to recover for lost use of a pipeline it used to transport natural gas from wells in the Gulf of Mexico to shore. Marathon maintained certain portions of the pipeline and had paid for construction of part of the pipeline. *Id.* at 1219-1220. Whereas Domar owned the barge that was damaged in its case, however, Marathon did not actually own any of the pipeline in question. *Id.* at 1225. The court of appeals held that Marathon could therefore not recover for lost use of the pipeline, because it could show no physical damage to any property it *owned*. *Ibid.*

The relationship between petitioner and Cunard in this case is analogous to that between Marathon and its pipeline company in *Texas Eastern*. Here, petitioner secured for its concession business use of space on board the QE2. As part of the terms of an agreement to rent certain space on QE2 to petitioner,

Cunard required that petitioner fund certain changes in the rental spaces and share its revenues with Cunard.

Neither of these payments granted petitioner any proprietary interest in the QE2. Under its agreement with Cunard, when petitioner vacates the QE2 concession spaces at the close of the contract period, it will take nothing with it, ceding all payments and improvements to Cunard. If there is a termination before the end of the seven-year rental agreement, Cunard would pay petitioner liquidated damages of 1/84th of the renovation expenditures for each month remaining on the terminated contract. C.A. App. A159.

The only proprietary interest petitioner had in the QE2 was its interest in its supplies and products brought on board for sale, none of which was physically damaged. Moreover, as the district court found, even if petitioner had a proprietary interest in the retail shops on the QE2, this "proprietary interest in the shops cannot also constitute an interest in the whole of the damaged vessel." Pet. App. 9a.

b. Petitioner also errs in asserting (Pet. 7) that "[t]his case would also have been allowed to proceed in the Fourth and Sixth Circuits." Petitioner cites (*ibid.*) *Marine Navigation Sulphur Carriers, Inc.* v. *Lone Star Industries, Inc.*, 638 F.2d 700 (4th Cir. 1981), which held that, where the plaintiff corporations did not allege or show physical damage to their properties or persons, the defendant vessel owner and charterer were *not* liable to corporations that suffered losses from business interruption and similar damages due to the closing of a river to marine traffic for several months. The court explicitly chose not to pass judgment on cases allowing recovery of damages

for economic loss by clam diggers and commercial fishermen as a result of oil spill injury, rejecting application of any such principle to "claims of indirect economic loss resulting from physical collision of vessels." *Id.* at 702. The opinion would afford no basis for petitioner to recover its lost business expenses in this case.

Petitioner also cites (Pet. 7) *Venore Transportation Co.* v. *M/V STRUMA*, 583 F.2d 708 (4th Cir. 1978), which allowed recovery by a company that time chartered a ship damaged by the defendant. The court allowed the time charterer to recover "charter hire paid." *Id.* at 711. The court noted, however, that "[it did] not intend * * * to suggest that the time charterer is entitled to lost profits. *That kind of claim is foreclosed by Robins Dry Dock.*" *Ibid.* (emphasis added).[6] Here, petitioner paid no hire to Cunard for the time the QE2 was undergoing repairs. Even under *Venore*, then, petitioner is not entitled to recover the business expectancy it seeks.

In *In re Bethlehem Steel Corp.*, 631 F.2d 441 (6th Cir. 1980), cert. denied, 450 U.S. 921 (1981), also cited by petitioner (Pet. 7), the court of appeals affirmed the district court's dismissal of claims against a shipowner for recovery for economic loss resulting from vessel delay. See 631 F.2d at 444, 449. The court of appeals noted that U.S. courts "have determined that the damages suffered by detained vessels which are

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[6] See also 583 F.2d at 711 ("Our only holding is that when there has been no suspension in the payment of charter hire during the period when the vessel is out of service, the time charterer who has paid the charter hire is entitled to recover what the owner would have been entitled to recover had those payments been suspended.").

not otherwise injured are too remote or indirect to warrant recovery." *Id.* at 448-449.

4. Finally, petitioner also claims (Pet. 20-23) that it falls within the "common venture at sea" exception to the *Robins* rule. Where a tortfeasor injures a ship engaged in a common venture at sea with a cargo owner, *Robins Dry Dock* does not preclude recovery by the cargo owner. See *Aktieselskabet Cuzco* v. *THE SUCARSECO*, 294 U.S. 394, 400 (1935) (*THE TOLUMA*) (where cargo was carried under a general average statement that apportioned expenses and losses, so far as they were of a general average nature, between vessel owner and cargo owners, cargo owners could recover for own risk at sea due to participation in common venture).

Petitioner argues (Pet. 22-23) that it was engaged in a common venture at sea with Cunard because it shared in the risks and perils of maritime ventures. That is incorrect. A common maritime venture is a situation where "ship and cargo *share by law* in certain of the risks, rights, and responsibilities of a voyage," *Cargill, Inc.* v. *Doxford & Sunderland, Ltd.*, 785 F.2d 1296, 1297 (5th Cir. 1986) (emphasis added), or where "the sacrifice or expenses f[a]ll upon the whole adventure and [a]re to be assessed in proportion to the share of each in that adventure," *THE TOLUMA*, 294 U.S. at 401. Petitioner's business is not cargo and its claim for damages here is for lost profits, not out-of-pocket costs. Had the arrangement between petitioner and Cunard constituted a common venture, petitioner would have been required to share liability for negligence in the navigation of QE2 in the event of

a collision or allision.[7] Petitioner also owes nothing to Cunard in the way of space hire, see *Venore Transp. Co.* v. *M/V STRUMA*, *supra*, or freight, see *Amoco Transp. Co.* v. *S/S MASON LYKES*, 768 F.2d 659 (5th Cir. 1985).[8]

Petitioner's reliance (Pet. 22) on Clause 6.0 in the Agreement between Cunard and petitioner is misplaced, for Clause 6.0 is in no way a sharing of the risks of marine perils. It is merely a term of the rental agreement specifying that petitioner has no claim against Cunard for certain losses to concessionaires when the loss is the result of circumstances beyond

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[7] Petitioner errs in attributing legal significance (Pet. 22) to the fact that the cargo in *THE TOLUMA* and petitioner's shops on the QE2 were both located on vessels. While perhaps necessary, physical location alone does not suffice to show a common venture at sea. *THE TOLUMA* held that *Robins Dry Dock* did not preclude recovery by the cargo owners of amounts they "had paid as general average contributions," 294 U.S. at 398, "a loss for which [the tortfeasor] was responsible," *id.* at 405; there was no claim for lost business expectancy. See also *id.* at 401 (cargo owner's claim was for contributions toward a "sacrifice or extraordinary expenses necessarily made or incurred to avert * * * peril and with a resulting common benefit to the adventure").

[8] The fact that petitioner bore the risk of its own lost profits in certain circumstances does not bring it within the scope of cases such as *M. & J. Tracy, Inc.* v. *THE ROWEN CARD*, 116 F. Supp. 516 (E.D.N.Y. 1953), or *United States* v. *Panama Transport Co.*, 174 F. Supp. 592, 595 (S.D.N.Y.), aff'd, 268 F.2d 739 (2d Cir. 1959), which allowed recovery for losses to owners of amounts of "hire" that were suspended due to the damage to the vessels, even though the charterers had indemnified the owners and received a right of subrogation.

Cunard's control. C.A. App. A160-A161.[9] As the district court correctly concluded, petitioner "has offered no evidence of an arrangement subjecting it to risks comparable to the general average responsibility of the plaintiffs in *The Toluma*." Pet. App. 12a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1996

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[9] Clause 6.0 of the Agreement is quoted at page 2, *supra*. Petitioner may have a claim against Cunard arising out of the grounding if it was Cunard's management's decision to take the QE2 into the waters of Vineyard Sound and if that decision constituted negligence.